

HOH BON TONG

A

v.

PP

COURT OF APPEAL, PUTRAJAYA

B

ABDUL MALIK ISHAK JCA

AZHAR MA'AH JCA

SYED AHMAD HELMY JCA

[CRIMINAL APPEAL NO: J-05-74-2008]

18 FEBRUARY 2010

C

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Appeal against conviction and sentence - Whether Judicial Commissioner erred in law in failing to appreciate defence case - Defence of passive possession - Whether considered - Whether defence case raised reasonable doubt*

D

EVIDENCE: *Burden of proof - Mens rea - Physical and mental possession - Elements of - Whether proved - Whether defence case raised reasonable doubt - Whether classic case of willful blindness*

E

On 30 August 2002, acting on information received, Chief Inspector Arsad bin Kamaruddin (PW5) led a police party to the 21st floor of New York Hotel at Jalan Abdullah Tahir, Johor Bahru where they took up positions behind the door leading to the stairway adjacent to room 2119. About half an hour later, PW5 saw a male Chinese, the appellant ("the accused") and a female Chinese Chong Ching Chyee (PW2) approaching room 2119. PW5 emerged from his hiding place and identified himself as "polis" whereupon according to PW5, both the accused and PW2 fled but were subsequently arrested. PW5 did a body search on the accused and found transparent plastic packets containing substances suspected to be syabu from the accused's left and right front trouser pockets. The contents were later analysed by the government chemist (PW4) and found to contain 81.43 grammes of methamphetamine, a dangerous drug. Nothing incriminating was found on PW2. Both the accused and PW2 were arrested. The accused was charged with trafficking in 81.43 grammes of methamphetamine under s. 39B(1)(a) of the Dangerous Drugs Act 1952 and punishable under s. 39B(2) of the same Act. PW2 was subsequently released and she became a witness for the prosecution.

F

G

H

I

A At the end of the prosecution's case, the learned Judicial Commissioner found that the prosecution had made out a *prima facie* case against the accused on the offence charged and called upon the accused to enter on his defence. The accused gave his evidence from the dock. He stated that he gave PW2 a lift home but PW2 then requested him to send her to meet her boyfriend, Ah Siong at New York Hotel. In the lift going up to the 21st floor, PW2 took out two plastic packets from her handbag and asked the accused to keep it for a while which he kept in his pockets. When getting out of the lift after it stopped on the 21st floor, they saw the police rush at them. PW2 and the accused ran a short distance before they were arrested. In essence, the defence of the accused was that he was an innocent carrier having physical possession of the drugs momentarily without him knowing that what he carried were drugs.

D At the conclusion of the trial, the Judicial Commissioner found that the prosecution had proved its case beyond reasonable doubt and found the accused guilty and convicted him accordingly. The accused was sentenced to death. The accused appealed against the conviction and sentence. The two grounds of appeal advanced before this court were that the learned Judicial Commissioner erred in law in failing to appreciate the defence case and alternatively, the defence of passive possession was not considered at the end of the defence case thus prejudicing the accused.

F **Held (dismissing the appeal of the accused and confirming the conviction and sentence imposed)**

Per Abdul Malik Ishak JCA delivering the judgment of the court:

(1) The defence's assertion that the learned Judicial Commissioner failed to appreciate the defence of the accused was totally misconceived. The learned Judicial Commissioner considered the unsworn statement of the accused from the dock. The learned Judicial Commissioner also considered the defence of innocent carrier advanced by the accused in his defence. The learned Judicial Commissioner was impressed with the demeanour of PW2 when she gave her evidence. The learned Judicial Commissioner saw PW2 and he believed her. The court here was not re-hearing nor re-seeing the witnesses but rather reading the cold print of the evidence. The cold print of PW2's evidence as seen in the appeal record spoke a thousand words. The truth of the defence case was weighed in a balance at all

- angles by the learned Judicial Commissioner. At the end of the defence case, the learned Judicial Commissioner after having seen the demeanour of PW2 in the witness box concluded that he preferred PW2's evidence as opposed to that of the accused. His Lordship also said that the authenticity of PW2's evidence was tested by vigorous cross-examinations of the learned defence counsel experienced in drug cases. This court had no audio-visual advantage enjoyed by the Judicial Commissioner and therefore must not hastily brush aside the findings of the learned Judicial Commissioner at the close of the case for the defence *Azahan Mohd Aminallah v. PP* (refd); *Leow Nghee Lim v. Reg* (refd); *Tengku Mahmood v. PP* (refd); *PP v. Mohd Radzi Abu Bakar* (refd). (paras 23, 24, 25, 26 & 45)
- (2) Despite the defence highlighting the purported roles played by Ah Siong and arguing that without Ah Siong's testimony, the prosecution failed to prove its case beyond reasonable doubt, the evidence here showed that the accused had *mens rea* possession of the drugs and it must be read in the light of the definition of trafficking in s. 2 of the Dangerous Drugs Act 1952. Here, the credibility of the prosecution's witnesses together with the facts and the circumstances of the case compelled the learned Judicial Commissioner to make the inference that the accused had *mens rea* possession of the packets in his pockets and that would be the drugs in question. The accused's claim that he did not know the contents of the packets to be drugs taken in its correct perspective with the defence version did not create any reasonable doubt. The accused took flight when he heard PW5 identifying himself as the "polis". This showed that the accused knew that he carried drugs in his possession. Here, there was no necessity to invoke s. 37(d) of the Dangerous Drugs Act 1952. The surrounding circumstances gave rise to the inference that the accused was in possession of the drugs at the material time. The conduct of the accused when confronted by PW5 certainly triggered an inference to be drawn in favour of the prosecution. *Saad Ibrahim v. PP* (foll); *Zulfikar Mustaffah v. PP* (foll); *Chan Pean Leon v. PP* (foll); *Neo Koon Cheo v. Reg* (refd); *Chan Kwok Keung & Anor v. The Queen* (foll). (paras 44, 57, 58, 59, 60, 64 & 65)
- (3) The learned Judicial Commissioner considered the defence case in its entirety and from all angles before deciding that the defence had not raised a reasonable doubt in the prosecution's

- A case. Ah Siong was not arrested by the police at all. This court was satisfied that at the conclusion of the trial, after considering all the evidence adduced, the prosecution had proved its case beyond reasonable doubt and the accused was rightly convicted for trafficking in the dangerous drugs as per the charge. *PP v. Chia Leong Foo* (dist). (paras 43 & 66)
- B
- (4) The oral decision of the learned Judicial Commissioner at the close of the case for the prosecution showed that his Lordship took into consideration the submission of the learned defence counsel that physical possession was proved but not *mens rea* possession. The physical and mental elements of possession were considered by the learned Judicial Commissioner. So, consequently, when the Judicial Commissioner made reference to the issue of passive possession, his Lordship was merely expressing his views in regard to the evidence adduced by the prosecution at the stage of the prosecution's case. This court found that that was done based on the available evidence as well as the submissions of both parties at the stage of the prosecution's case. Nothing sinister could be read into it. The accused was not prejudiced before the High Court because he was represented by a defence counsel and no substantial miscarriage of justice had been occasioned thereto. (para 69)
- C
- D
- E
- (5) In the context of possession of a dangerous drug, in order to prove the element of guilty knowledge or *mens rea* the duty of the prosecution was to prove that the accused knew the nature of the particular dangerous drug that he was in possession of as a dangerous drug or as a prohibited drug. There was no necessity for the prosecution to also prove knowledge pertaining to the name, type or exact qualities of the dangerous drug. Here, the prosecution had done just that and this court could not find any fault in that. The defence of innocent carrier must necessarily bring into the picture the concept of willful blindness. Here, there was evidence that the drugs were placed inside transparent plastic packets and the contents could be seen from the outside. It was mere folly on the part of the accused not to examine what he carried in his pockets. It was a classic case of willful blindness. *PP v. Hla Win* (refd). (paras 72, 73, 74 & 75)
- F
- G
- H

I

- (6) The learned Judicial Commissioner had not misdirected himself on the law. He had considered the evidence both for the prosecution and for the defence very carefully and painstakingly. He gave his reasons why he accepted and why he did not accept certain evidence and he correctly arrived at the conclusions which he did. It was a speaking judgment. The Judicial Commissioner had the advantage of seeing and hearing the evidence. This court did not have that advantage and saw no reason why it should interfere with his findings of facts and his preference for PW2's evidence and not the accused. This court also saw no reason to interfere in his final decision and accordingly dismissed the appeal of the accused and confirmed the conviction and sentence imposed by the learned Judicial Commissioner. (para 76)

Bahasa Malaysia Translation Of Headnotes

Pada 30 Ogos 2002, bertindak atas maklumat yang diterima, Ketua Inspektor Polis (PW5) membawa sekumpulan polis ke tingkat 21 Hotel New York di Jalan Abdullah Tahir, Johor Bahru di mana mereka menyembunyi di belakang pintu yang menuju ke arah tangga bersebelahan dengan bilik 2119. Setengah jam kemudian, PW5 melihat seorang lelaki berbangsa Cina, perayu ('tertuduh') dan seorang wanita berbangsa Cina (PW2) mendekati bilik 2119. PW5 keluar dari tempat sembunyinya dan memperkenalkan dirinya sebagai "polis" dan menurut PW5, kedua-dua tertuduh dan PW2 terus melarikan diri tetapi akhirnya ditangkap. PW5 memeriksa tubuh badan tertuduh dan menjumpai paket plastic lutsinar mengandungi bahan-bahan yang disyaki syabu dari tertuduh di dalam poket kiri dan kanan seluarnya. Kandungan-kandungan kemudiannya dianalisisakan oleh ahli kimia kerajaan (PW4) dan didapati mengandungi 81.43 gram methamphetamine, iaitu dadah berbahaya. Tidak terdapat bukti yang boleh menunjukkan PW2 bersalah dijumpai atas tubuh badannya. Kedua-dua tertuduh dan PW2 ditangkap. Tertuduh dituduh dengan pengedaran dadah 81.43 gram methamphetamine di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah s. 39B(2) Akta yang sama. PW2 dibebaskan dan menjadi saksi untuk pihak pendakwaan.

Di akhir kes pendakwaan, Pesuruhjaya Kehakiman memutuskan bahawa pihak pendakwaan telah berjaya membuktikan kes *prima facie* terhadap tertuduh di atas pertuduhan yang dituduh dan memanggil tertuduh membela diri. Tertuduh memberi keterangan dari kandang perbicaraan. Tertuduh menyatakan bahawa beliau telah

- A menumpangkan PW2 balik ke rumahnya tetapi PW2 telah memintanya membawa PW2 berjumpa dengan teman lelakinya, Ah Siong di Hotel New York. Di dalam lif yang membawa mereka ke tingkat 21, PW2 membawa keluar dua paket plastic dari tas tangannya dan meminta tertuduh menyimpannya untuk sementara waktu dan tertuduh terus meletakkannya di dalam poket-poket seluarnya. Apabila lif berhenti di tingkat 21 mereka pun keluar dari lif dan terus melihat pihak polis menuju ke arah mereka. PW2 dan tertuduh hanya sempat berlari beberapa jarak sebelum mereka ditangkap. Intipatinya, pembelaan tertuduh adalah beliau hanya membawa yang tidak bersalah yang mempunyai milikan fizikal dadah-dadah hanya seketika tanpa menyedari bahawa beliau sedang membawa dadah-dadah berbahaya.

- D Pada akhir perbicaraan, Pesuruhjaya Kehakiman mendapati bahawa pihak pendakwaan telah berjaya membuktikan kes melampaui keraguan munasabah dan mendapati tertuduh bersalah dan mensabitkannya. Tertuduh dihukum mati. Tertuduh merayu terhadap sabitan dan hukuman. Dua alasan rayuan yang dibangkitkan di sini adalah Pesuruhjaya Kehakiman khilaf dari segi undang-undang kerana gagal memahami kes pembelaan dan secara alternatif, pembelaan milikan pasif tidak dipertimbangkan di akhir kes pembelaan dan ini telah memprejudiskan tertuduh.

Diputuskan (menolak rayuan tertuduh dan mengesahkan sabitan dan hukuman yang dijatuhkan)

- F Oleh Abdul Malik Ishak HMR menyampaikan penghakiman mahkamah:

- (1) Pengataan pembelaan bahawa Pesuruhjaya Kehakiman gagal memahami pembelaan tertuduh disalah-tafsirkan. Pesuruhjaya Kehakiman telah mempertimbangkan kenyataan tidak bersumpah tertuduh dari kandang. Pesuruhjaya Kehakiman juga mempertimbangkan pembelaan pembawa yang tidak bersalah yang diujahkan oleh tertuduh dalam pembelaannya. Pesuruhjaya Kehakiman terpengaruh dengan demeanour PW2 apabila beliau memberi keterangan dan mempercayainya. Mahkamah di sini tidak akan mendengar-balik atau melihat-balik saksi-saksi tetapi membaca keterangan yang sedia ada. Keterangan PW2 yang dapat dilihat di dalam rekod rayuan memberi seribu makna. Kebenaran kes pembelaan diambil dan diimbangkan dari berbagai-bagai sudut. Di akhir kes pembelaan, Pesuruhjaya Kehakiman apabila melihat demeanour PW2 di dalam kandang saksi membuat kesimpulan beliau lebih cenderung kepada

- keterangan PW2 dari keterangan tertuduh. Pesuruhjaya Kehakiman juga menyatakan kesahihan keterangan PW2 telah melalui berbagai-bagai ujian pemeriksaan balas yang hebat oleh peguam pembela yang berpengalaman di dalam kes-kes dadah. Mahkamah ini tidak mempunyai manfaat pandang dengar seperti Pesuruhjaya Kehakiman dan oleh itu ia tidak boleh mengenyepikan dapatan-dapatan Pesuruhjaya Kehakiman di penutupan kes pembelaan *Azahan Mohd Aminallah v. PP* (dirujuk); *Leow Nghee Lim v. Reg* (dirujuk); *Tengku Mahmood v. PP* (dirujuk); *PP v. Mohd Radzi Abu Bakar* (dirujuk). A B
- (2) Walaupun pembelaan menegaskan penglibatan Ah Siong dan berhujah bahawa tanpa testimoni Ah Siong, pihak pendakwaan gagal membuktikan kesnya melampaui keraguan munasabah, keterangan di sini menunjukkan tertuduh mempunyai milikan *mens rea* dadah-dadah dan ia mesti dibaca dengan mengambilkira definisi pengedaran s. 2 Akta Dadah Berbahaya 1952. Di sini, kredibiliti saksi-saksi pihak pendakwaan bersama-sama dengan fakta-fakta dan keadaan-keadaan kes memaksa Pesuruhjaya Kehakiman membuat inferens bahawa tertuduh mempunyai milikan *mens rea* paket-paket di dalam poketnya dan itu adalah dadah-dadah yang berkenaan di dalam kes ini. Dakwaan tertuduh bahawa beliau tidak mengetahui kandungan-kandungan paket-paket adalah dadah jika diambil dari perspektif yang betul bersama-sama dengan versi pembelaan tidak mewujudkan keraguan munasabah. Tertuduh telah melarikan diri apabila mendengar PW5 memperkenalkan dirinya sebagai 'polis'. Ini menunjukkan tertuduh mengetahui bahawa tertuduh sedang membawa dadah di dalam milikannya. Di sini, tiada keperluan untuk mengguna s. 37(d) Akta Dadah Berbahaya 1952. Keadaan sekeliling menimbulkan inferens bahawa tertuduh mempunyai milikan dadah-dadah pada masa yang material itu. Tingkahlaku tertuduh apabila berhadapan dengan PW5 mencetuskan inferens yang berpihak kepada pihak pendakwaan. *Saad Ibrahim v. PP* (diikuti); *Zulfikar Mustaffah v. PP* (diikuti); *Chan Pean Leon v. PP* (diikuti); *Neo Koon Cheo v. Reg* (dirujuk); *Chan Kwok Keung & Anor v. The Queen* (diikuti). C D E F G H
- (3) Pesuruhjaya Kehakiman telah mempertimbangkan kes pembelaan dalam keseluruhannya dan daripada berbagai-bagai sudut sebelum memutuskan pembelaan tidak membangkitkan keraguan munasabah di dalam kes pendakwaan. Ah Siong tidak ditangkap oleh pihak polis. Mahkamah ini berpuas hati bahawa I

- A di akhir kes perbicaraan, selepas mempertimbangkan segala keterangan yang diberi, pihak pendakwaan telah membuktikan kesnya melampaui keraguan munasabah dan tertuduh disabit dengan betul untuk pengedaran dadah berbahaya seperti di dalam pertuduhan.
- B (4) Keputusan lisan oleh Pesuruhjaya Kehakiman di penutupan kes pendakwaan menunjukkan beliau telah mempertimbangkan penghujahan peguam pembelaan bahawa milikan fizikal dibuktikan tetapi bukan milikan *mens rea*. Unsur milikan fizikal dan mental telah dipertimbangkan oleh Pesuruhjaya Kehakiman.
- C Oleh itu, sebagai akibatnya, apabila Pesuruhjaya Kehakiman membuat rujukan kepada isu milikan pasif, beliau hanya memberi pandangan mengenai keterangan yang diberi oleh pihak pendakwaan pada peringkat kes pendakwaan. Mahkamah ini mendapati bahawa ini dibuat berdasarkan keterangan yang sedia ada bersama-sama dengan penghujahan kedua-dua pihak pada peringkat kes pendakwaan. Tiada apa-apa yang mencurigakan mengenainya. Tertuduh tidak diprejudiskan di hadapan Mahkamah Tinggi kerana tertuduh telah diwakili peguam pembelaan dan tidak berlakunya salah laksana keadilan yang besar.
- E (5) Di dalam konteks milikan dadah berbahaya, untuk membuktikan unsur pengetahuan bersalah atau *mens rea* kewajipan pihak pendakwaan adalah untuk membuktikan bahawa tertuduh mengetahui sifat dadah berbahaya dalam milikannya sebagai dadah berbahaya ataupun dadah terlarang. Tidak terdapat keperluan untuk pihak pendakwaan membuktikan pengetahuan berhubungan nama, jenis ataupun sifat-sifat sebenar dadah berbahaya tersebut. Di sini, pihak pendakwaan telah berbuat sedemikian dan mahkamah tidak boleh mencari kesalahan dengan perbuatan tersebut. Pembelaan pembawa yang tidak bersalah mestilah membawa ke dalam gambaran ini konsep tindakan yang melulu. Di sini, keterangan menunjukkan dadah-dadah diletakkan di dalam plastik paket lutsinar dan kandungan-kandungan boleh dilihat dari luar. Ia adalah perbuatan tidak bijaksana oleh tertuduh untuk tidak memeriksa apa yang dibawa di dalam poketnya. Ini adalah kes klasik tindakan melulu. *PP v. Hla Win* (refd)
- F
- G
- H
- I

- (6) Pesuruhjaya Kehakiman tidak tersalah arah dari segi undang-undang. Beliau telah mempertimbangkan keterangan untuk pendakwaan dan untuk pembelaan dengan cermat dan bersusah payah. Beliau memberi alasan-alasan mengapa beliau menerima dan tidak menerima keterangan tertentu dan telah mencapai kesimpulan yang betul. Ia adalah penghakiman bermaksud. Pesuruhjaya Kehakiman mempunyai kelebihan melihat dan mendengar keterangan. Mahkamah ini tidak mempunyai kelebihan itu dan tidak melihat adanya alasan untuk mengganggu dapatan fakta-fakta Pesuruhjaya Kehakiman serta kecenderungannya ke keterangan PW2 dan bukan ke keterangan tertuduh. Mahkamah ini juga tidak melihat alasan untuk campurtanngan dengan keputusan muktamad Pesuruhjaya Kehakiman maka rayuan tertuduh ditolak dan sabitan dan hukuman yang dijatuhkan oleh Pesuruhjaya Kehakiman disahkan.

A
B
C
D

Case(s) referred to:

- Andy Bagindah v. PP* [2000] 3 CLJ 289 CA (*refd*)
Azahan Mohd Aminallah v. PP [2005] 1 CLJ 374 CA (*refd*)
Balachandran v. PP [2005] 1 CLJ 85 FC (*refd*)
Chan Kwok Keung & Anor v. The Queen [1990] 1 CLJ 411; [1990] 3 CLJ (Rep) 386 CA (*fol*)
Chan Pean Leon v. PP [1956] 1 LNS 17 HC (*refd*)
Gooi Loo Seng v. PP [1993] 3 CLJ 1 SC (*dist*)
Lee Lee Chong v. PP [1998] 4 CLJ 655 CA (*refd*)
Leow Nghee Lim v. Regina [1955] 1 LNS 53 HC (*refd*)
Muhammed Hassan v. PP [1998] 2 CLJ 170 FC (*refd*)
Neo Koon Cheo v. Regina [1959] 1 LNS 64 HC (*refd*)
PP v. Badrulsham Baharom [1987] 1 LNS 72 HC (*refd*)
PP v. Chia Leong Foo [2000] 4 CLJ 649 HC (*refd*)
PP v. Hla Win [1995] 2 SLR 424 (*refd*)
PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC (*refd*)
Saad Ibrahim v. PP [1967] 1 LNS 154 HC (*fol*)
Tengku Mahmood v. PP [1974] 1 LNS 176 HC (*refd*)
Zulfikar Mustaffah v. PP [2001] 1 SLR 633 (*fol*)

E
F
G

Legislation referred to:

- Criminal Procedure Code, ss. 180(3), (4), 182A(1), (2)
 Dangerous Drugs Act 1952, ss. 2, 37(d), (da)(xvi), 39B(1)(a), (2)
 Evidence Act 1950, s. 114(g)

H

For the accused/appellant - Hisyam Teh Poh Teik; M/s Teh Poh Teik & Co
For the PP - Tetralina Ahmed Fauzi DPP

I

[Appeal from High Court, Johor Bahru; Criminal Trial No: 45-30-2003]

Reported by Susheila Sreedharan

A

JUDGMENT**Abdul Malik Ishak JCA:****Appeal**

B

[1] The appellant (“the accused”) was charged with trafficking in 81.43 grammes of methamphetamine on 30 August 2002 at 2.40am in front of room 2119, 21st floor, New York Hotel, Jalan Abdullah Tahir, Johor Bahru under s. 39B(1)(a) of the Dangerous Drugs Act 1952 and punishable under s. 39B(2) of the same Act.

C

D

[2] At the end of the prosecution’s case, the learned Judicial Commissioner found that the prosecution had made out a *prima facie* case against the accused on the offence charged and called upon the accused to enter on his defence (see s. 180(3) of the Criminal Procedure Code and the case of *Balachandran v. PP* [2005] 1 CLJ 85, FC). According to s. 180(4) of the Criminal Procedure Code “a *prima facie* case is made out against the accused where the prosecution has adduced credible evidence proving each ingredient of the offence which if unrebutted or unexplained would warrant a conviction”.

E

F

[3] At the conclusion of the trial, the learned Judicial Commissioner found that the prosecution had proved its case beyond reasonable doubt (see s. 182A(1) of the Criminal Procedure Code) and found the accused guilty as per the charge and convicted him accordingly (see s. 182A(2) of the Criminal Procedure Code). The accused was sentenced to death.

G

[4] This is the accused’s appeal against the conviction and sentence.

The Facts Of The Case

H

[5] Acting on information received, on 30 August 2002 at about 2.00am, Chief Inspector Arsad bin Kamaruddin (PW5) led a police party comprising of three other police personnel to the 21st floor of New York Hotel at Jalan Abdullah Tahir, Johor Bahru and there they took up positions behind the door leading to the stairway adjacent to room 2119.

I

[6] About half an hour later, PW5 saw a male Chinese (subsequently identified as the accused) and a female Chinese by the name of Chong Ching Chyee (PW2) approaching room 2119. Without further ado, PW5 emerged from his hiding place and

identified himself as “polis”. According to PW5, both the accused and PW2 fled but were subsequently arrested at about five metres from room 2119.

A

[7] PW5 did a body search on the accused. From the front right trouser pocket, PW5 found a transparent plastic packet containing substances suspected to be syabu (exh. P11). From the left front trouser pocket, PW5 found a transparent plastic packet. Inside that transparent plastic packet were 13 other smaller plastic packets each containing substances suspected to be syabu (exhs. P13B1 to P13B13).

B

C

[8] The contents of these plastic packets were later analysed by the government chemist (PW4) and found to contain 81.43 grammes of methamphetamine, a dangerous drug, and the subject matter of the charge.

D

[9] Nothing incriminating was found on PW2. Both the accused and PW2 were arrested. PW2 was subsequently released and she became a witness for the prosecution.

The Defence Of The Accused

E

[10] The accused gave his evidence from the dock. In essence, the defence of the accused was this. That he was an innocent carrier having physical possession of the drugs momentarily. His evidence may be summarised in this way.

F

[11] At the behest of PW2 (also known as Coco), the accused had given PW2 a lift home in the early hours of 30 August 2002. PW2 had a boyfriend known as Ah Siong. The accused also knew Ah Siong about one year before he was arrested. The accused had seen PW2 and Ah Siong together several times. Ah Siong was unable to send PW2 home because he was busy.

G

[12] According to the accused, as he was driving nearer to PW2’s house she received a telephone call through her handphone from Ah Siong who told her that Ah Siong was in New York Hotel and that Ah Siong wanted her to fetch something from her house to be delivered to him. PW2 requested the accused to send her to meet Ah Siong. The accused agreed.

H

[13] On arrival at PW2’s house, PW2 entered her house. About ten minutes later, PW2 emerged from her house and the accused then sent her to meet Ah Siong at New York Hotel.

I

- A [14] Upon arrival at New York Hotel, both the accused and PW2 took the lift to go to the 21st floor where room 2119 was located. In the lift, the accused saw PW2 opened her handbag and took out her handphone to call Ah Siong who was in room 2119. Before PW2 took out her handphone from her handbag, PW2 took out
- B from her handbag two plastic packets and asked the accused to keep it for a short while, while she tried to make the phone call to Ah Siong. The accused took the two plastic packets and kept them in his pockets. The accused did not know that the two plastic packets contained drugs and he had no reason to suspect them to contain
- C drugs. PW2 telephoned Ah Siong on her handphone but it was unsuccessful.

- D [15] When the lift stopped on the 21st floor, PW2 and the accused got out of the lift. PW2 walked towards room 2119. The accused followed suit. Then the accused saw three to four Malay men rushed at them. Both the accused and PW2 ran for a short distance before they were arrested.

The Grounds Of Appeal

- E [16] Two grounds of appeal were advanced before us, namely:
- (a) that the learned Judicial Commissioner erred in law in that his Lordship failed to appreciate the defence case; and
- F (b) alternatively, the defence of passive possession was not considered at the end of the defence case thus prejudicing the accused.

The First Ground

- G [17] Simply put, the defence of the accused was that he was a momentary innocent carrier when he carried the drugs in his pockets from the lift to outside the passage that led to room 2119 without him knowing that what he carried were drugs.
- H [18] It was emphasised that the learned Judicial Commissioner found as a fact:
- (a) that Ah Siong is a real person;
- (b) that on the date in question Ah Siong was in room 2119;
- I (c) that PW2 (also known as Coco) is the girlfriend of Ah Siong;

(d) that the accused knew Ah Siong for about a year prior to his arrest; and A

(e) that the accused had seen PW2 with Ah Siong on several occasions.

[19] It was argued that since the learned Judicial Commissioner have arrived at the above facts, he ought to have held that this was a case of an innocent carrier. It was pointed out that there was nothing incredible or improbable in the accused's defence bearing in mind that: B

(a) he had given a lift to PW2 to go to PW2's house and which fact was also conceded by PW2; and C

(b) that Ah Siong had requested PW2, Ah Siong's girlfriend, to fetch something ("the drugs") from PW2's house to be delivered to Ah Siong and towards this end PW2 had requested the accused to send her to room 2119 of New York Hotel. D

[20] It was submitted that to further strengthen the defence, PW2 had not given any explanation as to why she was together with the accused on the 21st floor approaching room 2119 in the early hours of 30 August 2002 even though she had denied the accused's version. It was emphasised that if what the defence had put or suggested is not true then the prosecution must through PW2 proffer an explanation for her presence in the passage way leading to room 2119 where her boyfriend Ah Siong was in the room. It was pointed out that it was not difficult to conclude that PW2 had gone to New York Hotel that morning in order to see her boyfriend or be with her boyfriend. Flowing from all these it was submitted that without an explanation from PW2 one cannot dismiss the defence of innocent carrier by the accused as being unreasonable. E F G

[21] Seen from this angle, it was submitted that it was erroneous on the part of the learned Judicial Commissioner to hold as reflected at p. 143 of the appeal record, vol. 2, that the: H

pernyataan OKT adalah rekaan yang disesuaikan untuk melepaskan diri dari pertuduhan yang dikemukakan terhadapnya.

[22] The learned defence counsel advanced four reasons to support his contention that what the learned Judicial Commissioner held was erroneous, namely: I

- A (a) that the accused's version had been put to PW2;
(b) that the accused had challenged PW2's version;
(c) that the accused had stated his defence of innocent carrier in his unsworn statement which is evidence; and
- B (d) PW2, on the other hand, had not proffered an explanation as to why she was at the passage leading towards room 2119.

- [23] To say as was said that the learned Judicial Commissioner failed to appreciate the defence of the accused was totally misconceived. The learned Judicial Commissioner considered the unsworn statement of the accused from the dock. His Lordship took into account the decision of this court in the case of *Azahan Mohd Aminallah v. PP* [2005] 1 CLJ 374, CA, when assessing the evidence of the accused. At pp. 139 to 140 of the appeal record at vol. 2, the learned Judicial Commissioner had this to say:
- C
- D

Isu mengenai pernyataan dari kandang orang salah

- E Kedudukan undang-undang mengenai pemilihan OKT untuk membuat pernyataan dari kandang orang salah telah dibincangkan secara terperinci oleh Gopal Sri Ram HMR dalam kes *Azahan bin Mohd Aminallah v. PP* [2004] 6 AMR 810. Beliau berkata di m.s. 820:

- F Without going into the matter in any detail, it suffices for us to say that there is a conflict among the High Courts as to whether an unsworn statement from the dock is evidence. *Wong Heng Fatt v. PP* [1959] MLJ 20; *PP v. Sanassi* [1970] 2 MLJ 198 and *Low Thim Fatt v. PP* [1989] 1 MLJ 304 say that it is not evidence. By contrast, Chang Min Tat J, in *Ng Hoi Cheu v. PP* [1968] 1 MLJ 53 held that it is evidence.
- G And there are *dicta* in many other cases, Malaysian, Australian and at least one decided by the Privy Council which say quite emphatically that such an unsworn statement is evidence for the purposes of a trial. All the relevant cases may be found in two articles published in the Malayan Law Journal. The first is that by that very learned scholar Professor Ahmad Ibrahim in [1975] 2 MLJ vi. The other is by Professor Mohd Akram in [2003] 1 MLJ clxix.
- H

- I In our judgment, in the context of s. 257(1) the critical phrase is 'elects to give evidence' and not 'elects to give evidence on oath'. The former is much wider than the latter and must *ex necessitate rei* include the making of an unsworn statement from the dock. We are therefore persuaded that the reasoning of Chang Min Tat J, in

Ng Hoi Cheu v. PP is correct. Accordingly, the fact that the appellant elected to make an unsworn statement from the dock did not exclude the operation of s. 257(1).

A

[24] The learned Judicial Commissioner also considered the defence of innocent carrier advanced by the accused in his defence. This was what the learned Judicial Commissioner said in his written judgment (see pp. 140 to 145 of the appeal record at vol. 2):

B

Pada intipatinya, pembelaan OKT ialah 'innocent carrier'. OKT mengatakan bahawa apabila dia dan SP2 berada dalam lif untuk ke bilik 2119, SP2 yang dipanggilnya sebagai 'Coco' telah mengeluarkan 2 paket plastik yang mengandungi ekshibit dadah dan meminta beliau menyimpannya sementara SP2 menelefon Ah Siong. OKT mengambil 2 paket plastik itu dan menyimpannya di dalam poket seluarnya tanpa rasa ragu. SP2 cuba menghubungi Ah Siong tetapi tidak berjaya. SP2 berjalan menuju ke bilik 2119 dengan diikuti oleh OKT. Mereka kemudiannya telah ditangkap oleh SP5 dan anggota-anggotanya. OKT mengatakan beliau tidak mengetahui 2 paket plastik tersebut mengandungi dadah berbahaya.

C

D

Sebagai suatu fakta, mahkamah menerima bahawa sememangnya wujud seorang yang bernama Ah Siong dan pada masa material dia berada di bilik 2119, Hotel New York. SP2 sendiri mengesahkan bahawa beliau mempunyai seorang teman lelaki bernama Ah Siong. OKT juga mengesahkan bahawa SP2 ialah teman wanita Ah Siong. Ah Siong telah dikenali oleh OKT selama setahun sebelum OKT ditangkap. Mengikut OKT, beberapa kali semasa pertemuannya dengan SP2, Ah Siong hadir bersama.

E

F

Selepas memberi perhatian dan meneliti semua aspek keterangan, mahkamah meragui kebenaran keterangan OKT bahawa beliau hanya menemani SP2 ke Hotel New York dan bukan untuk tujuan menghantar ekshibit dadah tersebut kepada Ah Siong. Semenjak OKT mengambil SP2 di perhentian bas dan menghantarnya pulang ke rumah yang dikatakan untuk 'mengambil sesuatu' dan seterusnya membawa SP2 ke Hotel New York, OKT mengatakan beliau 'tidak pernah pada bila-bila masa bertanyakan Coco apakah barangan yang dihantar oleh beliau kepada Ah Siong kerana saya tidak mengesyaki apa-apa. Ini adalah kerana ianya tidak ada kait mengait dengan saya. Pada masa itu, saya hanya memberikan bantuan menghantar Coco berjumpa Ah Siong'. Perlu juga diberi perhatian bahawa apabila OKT dan Coco sampai di hotel itu, ia bukanlah waktu biasa tetapi hari sudah pagi.

G

H

Adalah sukar juga dipercayai bahawa ekshibit dadah itu telah diserahkan oleh SP2 kepada OKT semasa mereka berada di dalam lift menuju ke bilik 2119 hotel itu semata-mata atas alasan SP2 ingin mengeluarkan telefon bimbit dari beg tangannya untuk

I

- A menelefon Ah Siong dan OKT tidak mengetahui isi 2 pekete plastik lutsinar itu atau bertanya kepada SP2 tentangnya. Sebelum ini, jika fakta ini adalah benar, 2 pekete plastik itu telah berada di dalam beg tangan SP2 semenjak dari rumahnya sehinggalah mereka tiba ke dalam lift tanpa menimbulkan apa-apa masalah kepada SP2.
- B Beberapa minit sahaja sebelum mereka sampai di bilik 2119 di mana Ah Siong berada, ekshibit dadah itu dikatakan telah diserahkan oleh SP2 kepada OKT untuk disimpan di dalam poket seluarnya dan OKT 'tidak tahu menahu bahawa pekete plastik tersebut yang ditemuinya di poket seluar ... mengandungi dadah berbahaya'.
- C Sebagai satu penemuan fakta, mahkamah berpendapat keterangan OKT dalam aspek ini adalah tidak munasabah. SP2 telah menafikan bahawa dia telah menyerahkan ekshibit dadah itu kepada OKT semasa mereka berada dalam lift. Fakta bahawa setiap kali OKT bertemu dengan SP2, SP2 akan membawa beg tangan juga tidak boleh dengan apa-apa cara menyokong dakwaan OKT bahawa SP2 telah mengeluarkan ekshibit dadah dan menyerahkan kepadanya semasa berada di dalam lift.
- D Berdepan dengan dua versi yang berlawanan iaitu versi SP2 dan OKT, mahkamah mempercayai versi SP2 kerana mahkamah telah melihat 'demeanour' beliau semasa memberi keterangan dan kesahihan keterangannya telah diuji melalui soal balas yang bertubi-tubi oleh peguambela terpelajar, seorang peguam yang berpengalaman dalam kes-kes dadah. SP2 telah dengan tegas menafikan cadangan peguambela bahawa dia telah menyerahkan ekshibit dadah itu kepada OKT semasa berada di dalam lift.
- E Sebaliknya, mahkamah berpendapat bahawa pernyataan OKT adalah rekaan yang disesuaikan untuk melepaskan diri dari pertuduhan yang dikemukakan terhadapnya. Memandangkan OKT membuat pernyataan dari kandang orang salah, kebenaran dan kesahihan keterangannya tidak dapat dipastikan dan keberatan '(weight)' yang boleh diberi adalah tidak seutuh keterangan SP2. Seperti yang diputuskan dalam kes *Lee Boo Gan (f) v. Ragina* [1954] MLJ 163, bahawa walaupun 'there can be very few cases in which a statement made by the accused from the dock, which cannot be tested by cross-examination, can by itself amount to proof of anything' dan 'it would have to be very convincing statement before it could, by itself, rebut a presumption of law'.
- F Peguambela terpelajar menghujahkan bahawa memandangkan jumlah ekshibit dadah yang terlibat ialah 81.43 gram methamphetamine iaitu jumlah yang dikatakan amat kecil, beban bagi OKT mematahkan anggapan statutori di bawah seksyen 37(da)(xvi) Akta adalah lebih mudah atau senang dan OKT telah berjaya berbuat sedemikian.
- I

Mengenai aspek ini, atas imbalan kebarangkalian, mahkamah berpendapat bahawa OKT telah gagal untuk mematahkan anggapan tersebut. Berdasarkan kepada bentuk 13 paket-paket plastik kecil ekshibit dadah yang telah dibungkus sedemikian rupa, tidaklah boleh disimpulkan bahawa ia adalah untuk kegunaan OKT sendiri. Tambahan pula, OKT tidak pernah mencadangkan dalam pembelaannya atau semasa kes pihak pendakwaan bahawa ekshibit dadah tersebut sebenarnya adalah untuk kegunaan beliau sendiri. Pembelaan yang dikemukakan sepanjang perbicaraan ialah dia tidak mengetahui isi kandungan 2 paket-paket plastik tersebut dan bukan pembelaan 'personal consumption'. Pembelaan tentang ketiadaan pengetahuan yang diperlukan ini telah ditolak oleh mahkamah berdasarkan kepada fakta dan keadaan yang wujud dalam kes ini seperti yang dibincangkan sebelum ini.

A

B

C

Berpanduan kepada kes *Mohamad Radhi bin Yaakob v. PP* [1991] 3 MLJ 169 dan *Mat v. PP* [1963] MLJ 263, mahkamah memutuskan bahawa versi pembelaan OKT adalah tidak boleh dipercayai dan tidak menimbulkan apa-apa keraguan yang munasabah terhadap kes pihak pembelaan. Versi pembelaan juga telah gagal mematahkan anggapan statutori di bawah seksyen 37(da)(xvi) Akta. (Lihat *PP v. Yuvaraj* [1969] 2 MLJ 89).

D

Dalam keadaan sedemikian, OKT didapati bersalah dan disabitkan dengan kesalahan di bawah seksyen 39B(1)(a) Akta dan dihukum mati seperti yang ditetapkan oleh undang-undang.

E

[25] The learned Judicial Commissioner was certainly impressed with the demeanour of PW2 when she gave her evidence. This did not go down well with the learned counsel for the accused. We are aware of what Taylor J, said in *Leow Nghee Lim v. Regina* [1955] 1 LNS 53; [1956] 22 MLJ 28 in regard to demeanour at p. 30 of the report. There Taylor J, said:

F

The Magistrate explained, with commendable care, his reasons for rejecting the evidence of the accused. He said the demeanour of the accused in the box was bad. It certainly was very bad but demeanour is a most unsafe guide. It sometimes happens that a perfectly honest man becomes confused and contradictory in the witness box whereas many rogues have excellent demeanour.

G

H

[26] However, the learned Judicial Commissioner saw PW2 and he believed her. We are now dealing with an appeal which allows us to re-hear and re-view the evidence. But we are not re-hearing nor re-seeing the witnesses. Rather we are reading the cold print of the evidence. In short, we are not re-hearing the evidence of PW2. The cold print of her evidence as seen in the appeal record speak a

I

- A thousand words. We are mindful of the judgment of Raja Azlan Shah FJ (as His Majesty then was) in *Tengku Mahmood v. Public Prosecutor* [1974] 1 LNS 176, that “demeanour is not always the touch-stone of truth” but the truth of the defence case was weighed in a balance at all angles by the learned Judicial Commissioner.
- B Moreover, we lack the audio-visual advantage enjoyed by the learned Judicial Commissioner (*Public Prosecutor v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457, FC).

C [27] The following submissions were made in an attempt to show that the learned Judicial Commissioner failed to examine the evidence of PW2 from the angle of motive:

- (a) that PW2 is a suspect;
- (b) that PW2 was arrested together with the accused and that she was released and became a prosecution witness;
- (c) that it was put to PW2 that she was the trafficker and, consequently, the learned Judicial Commissioner should be slow and cautious in accepting her evidence as the truth; and
- (d) that the evidence of PW2 should not be accepted at face value.

F [28] In *Gooi Loo Seng v. PP* [1993] 3 CLJ 1, the Supreme Court criticised the trial court for accepting the suspect’s evidence at face value. Relying on this case we were urged to hold that the learned Judicial Commissioner should not have accepted the evidence of PW2 at face value. Edgar Joseph Jr, SCJ in that case at p. 4 made the following observations:

G We note also that the trial judge accepted at full face value the testimony of Tan Ah Kwai that although she had a set of keys to the bedroom she never ever entered it when the appellant was not in. In thus accepting the testimony of Tan Ah Kwai, the trial judge does not seem to have recognised that Tan Ah Kwai might have had every possible motive to suppress the truth and to lie, if necessary, at the expense of the appellant, bearing in mind that she was an obvious suspect. In any event, we consider that Tan Ah Kwai’s testimony on this point was, to put it mildly, an improbable story. The fact of the matter was that she could have had access to the bedroom, and if necessary, with her friends, without attracting the attention of the appellant, if she so wished. The trial judge however adopted a Nelsonian approach to Tan Ah Kwai’s testimony, and as a result, rejected the crucial part of the defence case which was that the heroin was concealed in his bedroom without his knowledge.

I

[29] While we acknowledge the salient arguments set out in that passage, we must emphasise that the facts in *Gooi Loo Seng v Public Prosecutor (supra)* are poles apart from the present appeal. In that case, the accused, his girlfriend and her friends could have access to the room occupied by the accused and his girlfriend. In that case too, the contents of the search list portrayed a materially different story from the evidence of the officer in charge and the trial court did not view the entire evidence objectively with the result that, on appeal, the conviction and sentence were set aside by the Supreme Court.

[30] Here, PW2 was never charged for the same offence as the accused. In her evidence, PW2 categorically stated that the drugs that were found in the front right trouser pocket of the accused and in the front left trouser pocket of the accused were not hers. PW2 disagreed to the suggestion that she was at the scene to see her boyfriend and she too disagreed to the suggestion that she was the one who gave the packets containing drugs to the accused.

[31] In regard to the recovery of the drugs from the pockets, this was what PW2 said in examination-in-chief (see p. 17 of the appeal record at vol. 1):

4 orang lelaki Melayu itu menggeledah seluruh badan dan mendapati sesuatu dalam poket seluar OKT. Mereka mendapat pekete-pekete plastik lutsinar yang disyaki syabu. Saya tidak ingat berapa banyak pekete yang dijumpai. Saya tidak ingat apakah jenis seluar yang dipakai oleh OKT. Tetapi seluar panjang dan berwarna putih. Saya berada berhampiran dengan OKT semasa OKT ditangkap. Saya nampak pemeriksaan dijalankan.

Mahkamah: Eks. P4A dan Eks. P4B dirujuk kepada saksi.

Ya, Eks. P4A ialah gambar seluar yang dipakai oleh OKT semasa beliau ditahan.

Eks. P4A dan Eks. P4B menunjukkan pekete-pekete plastik yang dijumpai dalam poket seluar OKT.

[32] Again, under examination-in-chief, PW2 testified at p. 19 of the appeal record at vol. 1 as follows:

Mahkamah: 15 pekete-pekete plastik lutsinar bertanda 'A', 'B', 'B1 - B13' ditunjukkan kepada saksi.

Ya, inilah pekete-pekete yang saya lihat dijumpai dalam poket seluar yang dipakai oleh OKT.

- A [33] Finally, at p. 20 of the appeal record at vol. 1, PW2 said in examination-in-chief as follows:

Selain daripada pekete-pekete plastik, tidak ada barang lain dijumpai dalam poket seluar OKT.

- B Pekete-pekete plastik itu bukan kepunyaan saya.

[34] The cross-examination of PW2 can be found at pp. 21 to 22 of the appeal record at volume 1. This was what was recorded:

- C Sebelum dibebaskan, pihak polis memberitahu saya kena datang ke mahkamah untuk menjadi saksi. Saya tidak setuju polis mengatakan kepada saya bahawa saya kena datang dan memberi keterangan bahawa pekete-pekete plastik itu kepunyaan OKT.

- D Ya, saya juga dipanggil sebagai 'Coco'. Saya tidak setuju pada masa itu, saya ada teman lelaki bernama David. Ya, pada masa itu, saya ada 'boyfriend'. Nama Cinanya Ah Siong.

Pada 30.8.2002, OKT ada hantar saya balik ke rumah, iaitu sebelum 12.00 malam.

- E Saya tidak setuju apabila saya sampai di rumah, saya menerima panggilan Ah Siong melalui telefon bimbit saya. Saya tidak setuju Ah Siong meminta saya berjumpa dengannya di Hotel New York.

- F Saya tidak setuju Ah Siong akan menunggu saya di bilik no. 2119 di Hotel New York. Ah Siong tidak tahu bahawa OKT ada hantar saya balik ke rumah pada malam itu.

Saya tidak setuju Eks. ID11, Eks. ID12 dan Eks. ID13(B1) - Eks. ID13(B13) saya ambil di rumah saya untuk dihantar kepada Ah Siong di Hotel New York.

- G Saya tidak setuju tujuan Ah Siong panggil saya ialah untuk ambil kesemua dadah itu dan menghantarkannya kepada beliau. Saya tidak setuju Ah Siong minta OKT membawa saya ke Hotel New York dengan kereta beliau.

- H Semasa saya pergi ke Hotel New York, saya ada membawa sebuah beg tangan. Saya mempunyai hand phone pada masa itu.

- I Saya tidak setuju semasa dalam lif saya keluarkan pekete-pekete plastik daripada beg tangan saya dan menyerahkannya kepada OKT. Saya tidak setuju pada masa itu juga saya beritahu OKT saya nak mengambil hand phone dari dalam beg. Saya tidak setuju pada masa itu OKT mengambil 2 pekete dan memasukkannya ke dalam poket beliau.

Saya tidak setuju semasa keluar dari lif saya cuba menelefon Ah Siong.

A

Apabila sampai, saya tidak ketuk pintu bilik.

Keempat-empat orang lelaki Melayu itu ada tunjukkan kad kuasa. Saya setuju keempat-empat lelaki itu keluar daripada pintu dengan cepat. Ya, pada masa itu saya terkejut dan sedikit takut. Oleh sebab itu saya lari.

B

[35] In appraising the evidence of PW2, it would be ideal to refer to the case of *PP v. Badrulsham Baharom* [1987] 1 LNS 72; [1988] 2 MLJ 585. In that case, the defence counsel attempted to persuade the trial judge not to accept the evidence of Noor Azlan bin Osman (PW7) because he was also arrested and remanded for 14 days and subsequently put under restrictive order. In a well written judgment, Lim Beng Choon J, at pp. 592 to 593 had this to say:

C

D

This is exactly what happened in the instant case concerning the detention of Noor Azlan and Bakree bin Jamal. All that the evidence in the instant case has shown is simply this: it is true that the police had detained Noor Azlan for 14 days but nevertheless they could not collect sufficient evidence that could lawfully be used in court to fasten PW7 with the offence with which the accused was charged. This clearly shows that there is no basis upon which the accused could have grounded his allegation or his assertion against PW7. Although PW7 might be involved in the drug trafficking but this court is left in the dark as to the extent of his involvement. Be that as it may, the involvement of PW7 by itself cannot be construed as cogent evidence that the accused was not in possession with *mens rea* of P3 and its contents at the material time. To accede to the learned defence counsel's suggestion would mean unsubstantiated by evidence except the bare word of the accused which is incompatible with the evidence adduced in this court. More significantly, I would also have to assume that the police deliberately let loose a guilty person and instead chose to charge an innocent man for an offence in which he played very little or no part at all. This I cannot and will not do in the absence of any evidence. Basing on all these pieces of evidence, the upshot is that they strongly bear out the conclusion that the accused had knowledge of the contents of P3. More importantly, these pieces of evidence also fully bear out my conclusion that the collection of P3 by the accused as asserted by him on behalf of and for later delivery to Noor Azlan at the Cathay Theatre on the morning of November 22, 1982 is from its inception highly incredible. In any event, the involvement of PW7, and for that matter Bakree bin Jamal, in the drug trafficking operation

E

F

G

H

I

- A which is the subject of the charge against the accused cannot in any way lessen the guilt of the accused because at its highest, it might be a joint venture and it is fortunate for PW7 and Bakree bin Jamal that the police were not able to charge them jointly with the accused.
- B [36] Yong Pung How CJ (Singapore) writing a dissenting judgment in the case of *Public Prosecutor v. Hla Win* [1995] 2 SLR 424, CA, at p. 438, had this to say:
- C In this connection, I am mindful of the principle that the appellate court should generally defer to the conclusion which the trial judge has formed when a trial judge makes findings of fact, including a finding of inferential fact of knowledge, based on the credibility of witnesses.
- D [37] It must be recalled to mind that the learned Judicial Commissioner at p. 143 of the appeal record at vol. 2 expressed his preference in regard to the version of PW2 as opposed to the version of the accused principally because of the demeanour of PW2. That was a finding of fact par excellence. The learned Judicial Commissioner also expressed his views that the weight of the evidence of the accused in the dock cannot be equated at par with
- E the weight of the evidence of PW2 because the evidence of the accused cannot be tested by way of cross-examination.
- F [38] This court in *Andy Bagindah v. PP* [2000] 3 CLJ 289, CA, refused to interfere with the findings of the trial judge because the trial judge was in a better position to assess the findings.
- G [39] Next, it was argued that the prosecution failed to call Ah Siong as a rebuttal witness to demolish the defence. It was submitted that Ah Siong may not be important to the prosecution up to the point the prosecution closed its case. But after hearing the defence, so submitted the learned defence counsel, the actual trafficker is PW2 and/or Ah Siong and it was incumbent on the part of the prosecution to call Ah Siong as a rebuttal witness to rebut the defence. It was submitted that Ah Siong was in the hotel room waiting for PW2. It was further submitted that Ah Siong could be called to say that he did not ask PW2 to send the drugs to him. And, it was submitted further that without Ah Siong, a reasonable doubt exists in favour of the accused.

I

[40] In *PP v. Chia Leong Foo* [2000] 4 CLJ 649, the police gave chase to the accused who was riding a motorcycle with a pillion by the name of Yee Chin Koon. The accused was speeding in order to avoid arrest. The motorcycle was registered in the name of the accused. When the motorcycle passed PW6, PW6 did not see Yee Chin Koon holding anything. PW6 followed the motorcycle from behind and shouted the word “Police” at the accused. The accused did not stop but instead accelerated the speed of his motorcycle. When the accused was trying to escape, PW6 saw the accused taking out a white bag from the carrier of the motorcycle and throwing it away. PW6 did not see Yee Chin Koon throwing anything. PW6 then came closer to the motorcycle. The motorcycle lost control and knocked into the road divider. Both the accused and Yee Chin Koon fell down. Yee Chin Koon got up and tried to escape, was chased and arrested by the police. PW6 said that he saw PW4 picked up the white bag which the accused had thrown. PW6 confirmed that the bag retrieved by PW4 was the bag that the accused had thrown. The evidence of PW4 was in tandem with the testimony of PW6. It was found that the bag had ten plastic packets suspected to contain heroin. Upon analysis by the chemist, they were found to contain 218.79 grammes of heroin and monoacetylmorphines. It was suggested to PW4 and PW6 in cross-examination that the white bag was held by Yee Chin Koon; that the motorcycle was knocked into from behind; that the accused wore the yellow helmet at the material time and he did not throw the white bag. These suggestions were denied by PW4 and PW6. In acquitting and discharging the accused, the court found PW4 and PW6 to be credible witnesses and accepted their version of the sequence of events. The court held that the white bag containing the dangerous drugs was in the carrier of the motorcycle. It was therefore clearly visible to the accused. The accused was the owner of the motorcycle and he was riding the motorcycle at the material time. He was therefore in charge of the motorcycle. These facts, according to the court, led to the inference that the accused was in custody or control of the white bag in the carrier of the motorcycle. The court held that the fact that the accused took the bag from the carrier and threw it away coupled with the fact that he attempted to flee in such circumstances by accelerating the speed of the motorcycle when confronted by the police connected him to the offence with which he had been charged. The combined effect of the inferences showed that he was in possession of the white bag, at the material time, and knew the nature of its contents. As the accused was transporting the dangerous drugs at the material time, the

A

B

C

D

E

F

G

H

I

- A prosecution had made out a *prima facie* case of trafficking against him. It was held that the liability of the accused was not in any way affected by the presence of Yee Chin Koon with him at the time of arrest because the prosecution had made out a clear and complete case against the accused. The only evidence against Yee
- B Chin Koon was his act of running away which, in the absence of other evidence, only showed knowledge by him of the possession of the drugs by the accused. It was further held that as the court had found that the prosecution had made out a *prima facie* case against the accused, this meant that the prosecution had led sufficient
- C evidence to unfold the narrative of its case. Thus, the prosecution's failure to call Yee Chin Koon as a witness or make him available to the defence was not fatal at this stage. After the defence was called the doubt created by the defence on the person who was wearing the yellow helmet and the reason why the motorcycle fell
- D raised doubts as to the person who actually threw the white bag. The court also held that upon a consideration of the whole of the evidence adduced, the court was satisfied that the defence had raised a reasonable doubt in the prosecution's case. The court further held that as proof of guilt can be established only on the whole of the
- E evidence adduced, it emerged that Yee Chin Koon's evidence is material which the prosecution ought to have adduced. This raised the presumption under s. 114(g) of the Evidence Act 1950 that if such evidence had been adduced it would have been unfavourable to the prosecution. The court was not satisfied that the prosecution
- F had proved its case against the accused beyond reasonable doubt.

[41] In *Lee Lee Chong v. Pendakwa Raya* [1998] 4 CLJ 655, CA, this court held at p. 665 that:

- G A maximum evaluation of the evidence shows that, on the date and at the time specified in the original charge, the accused made delivery of the 155 grams of heroin in the manner described by PW8. It follows that the prosecution had made out a case of trafficking under section 39B of the Act in accordance with the test laid down by the majority in *Arulpragasam v. Public Prosecutor*
- H [1997] 1 AMR 329.

[42] Earlier on at the same page, in the case of *Lee Lee Chong v. Pendakwa Raya* (*supra*), this court said as follows:

- I To put it in another way, the evidence of the informer (who had by his conduct become an agent provocateur) was neither relevant nor material to the allegation that the accused had, at the request of PW8, delivered the drug which forms the subject matter of the charge.

Accordingly, the prosecution's failure to call or make him available to the defence is of no consequence at this stage of the case. Whether it may be of consequence after the accused has given his evidence is a matter of pure speculation into which we do not propose to indulge.

A

[43] The learned defence counsel heavily relied on *Public Prosecutor v. Chia Leong Foo (supra)*; and *Lee Lee Chong v. Pendakwa Raya (supra)* to drive home the point that without calling Ah Siong, a reasonable doubt exists and the accused ought to be acquitted. Here, after the defence was called we are not in doubt that it was the accused who trafficked the 81.43 grammes of methamphetamine on the date, time and place in question. Upon a consideration of the whole of the evidence adduced, we are satisfied that the defence had not raised a reasonable doubt in the prosecution's case. Ah Siong was not arrested by the police at all. Whereas Yee Chin Koon in the case of *Public Prosecutor v. Chia Leong Foo (supra)* was arrested by the police and he was not called to give evidence.

B

C

D

[44] In regard to Ah Siong, PW2 said in cross-examination that she had a boyfriend and his Chinese name is Ah Siong. She denied receiving any phone call from Ah Siong through her hand phone when she reached her house after being sent by the accused. She disagreed that Ah Siong requested her to meet him at New York Hotel. She did not agree that Ah Siong would be waiting for her in room 2119 of New York Hotel. She said that Ah Siong did not know that the accused would be sending her home that night. She did not agree that the exhibits which she took from her house were meant to be sent to Ah Siong at New York Hotel. She did not agree that Ah Siong called her to take all the drugs and send them to Ah Siong. She did not agree that Ah Siong requested the accused to send her to New York Hotel in the accused's motor car. She did not agree that when she got out of the lift she tried to telephone Ah Siong. She said that she did not knock at the room door.

E

F

G

[45] Thus, at the end of the defence case, the learned Judicial Commissioner after having seen the demeanour of PW2 in the witness box concluded that he preferred PW2's evidence as opposed to that of the accused. His Lordship also said that the authenticity of PW2's evidence was tested by vigorous cross-examinations of the learned defence counsel experienced in drug cases. We have no audio-visual advantage and we must not hastily brush aside the findings of the learned Judicial Commissioner at the close of the case for the defence.

H

I

A [46] In regard to Ah Siong, PW5 under cross-examination testified that he did not agree that the accused had told him that the accused brought PW2 to meet her boyfriend in room 2119. PW5 testified that after the accused was arrested, he did not check room 2119. PW5 said that he did not know whether PW2's boyfriend by
B the name of Ah Siong was in room 2119. PW5 also said that he did not know that PW2 came for the purpose of sending those things to her boyfriend, Ah Siong, who was in room 2119. PW5 also said that he did not know whether PW2 gave those things to the accused while they were in the lift.

C [47] In his judgment, the learned Judicial Commissioner accepted the evidence of both PW2 and PW5. By looking at their "demeanour" the learned Judicial Commissioner concluded that there were no reasons for them not to tell the truth when narrating the
D facts pertaining to the charge.

[48] In regard to Ah Siong, Chief Inspector Arman bin Ibrahim (PW6) who was the investigation officer of the case, was not cross-examined about Ah Siong. PW6 was only cross-examined pertaining to the exhibits of the case and PW6 ventured to give an answer (see
E p. 52 of the appeal record at vol. 1):

Saya tidak setuju barang-barang kes telah diganggu.

[49] When the defence was called, the accused elected to give his
F evidence in the dock as seen at pp. 77 to 81 of the appeal record at vol. 1.

[50] After the accused had given his evidence in the dock, the learned defence counsel said that he could not close the defence case and he asked for an adjournment to enable him to call Ah
G Siong to give evidence. The learned defence counsel then asked for a new date for continued hearing. At p. 81 of the appeal record at vol. 1, at the last paragraph, it was recorded as follows:

H PB: Saya tidak boleh menutup kes ini pada hari ini kerana saya bercadang untuk memanggil Ah Siong memberi keterangan. Minta satu tarikh baru untuk sambung bicara.

[51] "PB" stands for peguambela (defence counsel).

[52] The learned Judicial Commissioner then adjourned the
I continued hearing and the submission thereof to 30 April 2008 (see p. 82 of the appeal record at vol. 1).

[53] On 30 April 2008, the learned defence counsel called the Registrar of the Sessions Court as the defence witness and not Ah Siong before the defence closes its case. The learned defence counsel was entitled to do what he did. At p. 82 of the appeal record at vol. 1, the original Malay language text of the notes of evidence reads as follows:

A

B

PB: Saya ingin memanggil seorang saksi lagi sebelum menutup kes pembelaan. Dia bukan Ah Siong tetapi Pendaftar Mahkamah Sesyen.

[54] The Registrar of the Sessions Court gave evidence and tendered the original notes of evidence involving the accused at the magistrate's court in relation to an arrest case no: B83-3077-2002.

C

[55] At the close of the defence case, both the learned counsel for the defence and the learned deputy public prosecutor submitted before the learned Judicial Commissioner. The learned defence counsel emphasised in regard to the failure of the prosecution to call Ah Siong. The learned deputy public prosecutor submitted that the accused was arrested outside room 2119 of New York Hotel. That Ah Siong was in the room. Because of that Ah Siong did not see what had happened. Ah Siong was not in a position to confirm or deny the evidence of the prosecution's witnesses as well as the defence. For that reason the failure to call Ah Siong was not fatal. The original Malay language text of the submission of the learned deputy public prosecutor can be seen at p. 87 of the appeal record at vol. 1. It reads as follows:

D

E

F

Isu kegagalan memanggil Ah Siong

- (3) OKT ditangkap di luar bilik 2119 Hotel New York. Ah Siong berada di dalam bilik. Oleh itu, Ah Siong tidak nampak apa yang berlaku. Ah Siong tidak berada dalam kedudukan untuk mengesah atau menafikan keterangan saksi-saksi pendakwa dan juga pembelaan. Oleh itu, kegagalan memanggilnya tidak 'fatal'.

G

[56] We must reiterate the following salient facts. In her evidence, PW2 denied the involvement of Ah Siong that morning at the New York Hotel. PW5, the arresting officer, effected the arrest of the accused with the incriminating drugs in the accused's trouser pockets. PW5 did not know of the involvement of Ah Siong at all. PW5 also testified that after arresting the accused, room 2119 was not checked. PW5 also did not know as to what had happened in the lift. And PW6 was not cross-examined at all about Ah Siong.

H

I

- A [57] The defence highlighted the purported roles played by Ah Siong and argued that without the testimony of Ah Siong the prosecution had failed to prove its case beyond reasonable doubt. In our judgment, the evidence showed that the accused had *mens rea* possession of the drugs and it must be read in the light of the definition of trafficking in s. 2 of the Dangerous Drugs Act 1952.
- B

[58] Yong J, in *Saad Ibrahim v. Public Prosecutor* [1967] 1 LNS 154; [1968] 1 MLJ 158, at p. 159, rightly defined the meaning of possession in this way:

- C The possessor must be aware of his possession, must know the nature of the thing possessed and must have the power of disposal over it. Without these characteristics possession raises no presumption of *mens rea*. Without *mens rea* possession cannot be criminal except in certain cases created by statute, which is not applicable in this case.
- D

[59] And what Yong Pung How CJ Singapore said in *Zulfikar Mustaffah v. Public Prosecutor* [2001] 1 SLR 633, CA, at pp. 639 to 640, are germane to the occasion at hand. There his Lordship said:

- E For the element of ‘possession’ (within the meaning of s. 17 of the Misuse of Drugs Act) to be established, it must not only be shown that the accused had physical control of the drugs at the relevant time; the prosecution must also prove that the accused possessed the requisite knowledge as to the contents of what he was carrying: see *Warner v Metropolitan Police Commissioner* [1969] 2 AC 256;
- F *Tan Ah Tee & Anor v. PP* [1978-1979] SLR 211; [1980] 1 MLJ 49. In the course of the appeal before us, counsel for the appellant relied heavily on the fact that the contents of the bundles were securely wrapped in newspapers and could not be identified. We were accordingly invited to draw the inference that the appellant had no knowledge of the contents of the bundles.
- G

- We were unable to accede to this request. While the fact that the contents of the bundles were hidden from view may have been relevant in determining whether the requisite knowledge was absent, this factor should still not be given too much weight. Otherwise, drug peddlers could escape liability simply by ensuring that any drugs coming into their possession are first securely sealed in opaque wrappings. Rather, the court must appraise the entire facts of the case to see if the accused’s claim to ignorance is credible. As Yong Pung How CJ remarked in *PP v. Hla Win* [1995] 2 SLR 424 (at 438):
- H
- I

In the end, the finding of the mental state of knowledge, or the rebuttal of it, is an inference to be drawn by a trial judge from all the facts and circumstances of the particular case, giving due weight to the credibility of the witnesses.

A

[60] Here, the credibility of the prosecution's witnesses together with the facts and the circumstances of the case compelled the learned Judicial Commissioner to make the inference that the accused had *mens rea* possession of the packets in his pockets and that would be the drugs in question. The accused's claim that he did not know the contents of the packets to be drugs taken in its correct perspective with the defence version did not create any reasonable doubt. The accused took flight when he heard PW5 identifying himself as the "polis". This showed that the accused knew that he carried drugs in his possession.

B

C

[61] Section 2 of the Dangerous Drugs Act 1952 defined "trafficking" to include "the doing of any of the following acts, that is to say, manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, transporting, carrying, sending, delivering, procuring, supplying or distributing any dangerous drug otherwise than under the authority of this Act or the regulations made under the Act". They are certainly very wide and would cover any fact situation. Keeping, concealing, storing, transporting and carrying dangerous drugs involve the prerequisite element of possession. Whereas the sale and supply of dangerous drugs need not involve possession. But you certainly cannot keep, conceal, store, transport or carry dangerous drugs and be said to be trafficking in dangerous drugs unless you are in possession of them. It would appear that the definition of trafficking go far beyond mere possession or passive possession and when you are in possession of the dangerous drugs you are presumed to be trafficking if the amount of drugs possessed exceed the statutory limit as set out in s. 37(da) of the Dangerous Drugs Act 1952. I even venture to say that if a person is caught in possession of the dangerous drugs where the quantity is bigger than the statutory limit then the defence of personal consumption would collapse like a deck of cards because in such a situation the inference of trafficking would necessarily arise.

D

E

F

G

H

I

- A [62] Thomson J, in *Chan Pean Leon v. Public Prosecutor* [1956] 1 LNS 17; [1956] 22 MLJ 237, at p. 239 aptly said:

B Once possession is proved then before the accused person can be convicted it is necessary in addition to prove *mens rea*. And for this purpose as was pointed out by Gordon-Smith Ag. C.J. in the case of *Toh Ah Lam and Mak Thim v. Rex* [1949] M.L.J. 54, *supra*, it is necessary to prove that the person in possession knows the nature of the thing possessed.

C If the thing, as in *Toh's* case, is in a box which itself is in the possession of the accused it must be proved that he knew what was in the box. If, as in *Lee's* case, it was a lottery document it must be proved that he knew it was a lottery document. Here again knowledge cannot be proved by direct evidence, it can only be proved by inference from the surrounding circumstances. Again the possible variety of circumstances which will support such an inference is infinite. There may be something in the accused's behaviour that shews knowledge, or the nature of the thing may be so obvious that it is possible to say 'he must have known what it was' or, again in cases under the Dangerous Drugs Ordinance, there may be a statutory presumption which fills a gap in the evidence.

E

[63] In *PP v. Badrulsham Baharom (supra)*, at p. 589, Lim Beng Choon J, had this to say about knowledge:

F Knowledge being an element of the state of mind of a person, the obvious question is: how is one to prove the element of knowledge in order to establish possession. However that may be, certain modes of proof are acceptable as sufficient to distinguish between a genuine and a feigned defence. Those modes of proof are acceptable because unless a defendant confesses that he has the necessary knowledge which is an element of his state of mind such element must be judged from his outward acts or omissions.

G

H [64] Thus, you can draw inferences from the surrounding circumstances in order to show knowledge. Here, there was no necessity to invoke s. 37(d) of the Dangerous Drugs Act 1952. The surrounding circumstances gave rise to the inference that the accused was in possession of the drugs at the material time. A classic example would be the case of *Neo Koon Cheo v. Regina* [1959] 1 LNS 64; [1959] 25 MLJ 47. The facts in that case may be stated as follows. A raid was made by three police personnel on the attic of house no: 26, New Bridge Road on 21 January 1958 at about 8.20pm. The three police personnel comprised of a detective

I

sergeant, a detective corporal and a detective. On entering the attic both the detective corporal and the detective saw the appellant holding a confectionery tin in his hands and the appellant was attempting to escape from the attic by an opening on the left side of the attic. The tin was seized and examined and it was found to contain a phial of chandu, a small tin of chandu dross, an opium pipe-head, a rag and some tools. Ambrose J, held that the evidence was sufficient to make out a case against the appellant for possession of prepared opium and smoking utensils. At p. 50, this was what his Lordship said:

If my interpretation of section 37(d) of the Ordinance is not correct, the conviction on the first charge can be supported without having recourse to the presumption under section 37(d). The fact that the appellant was seen attempting to take the confectionery tin and its contents out of the attic as soon as the detectives entered the attic raises the inference that the appellant was endeavouring to put the tin and its contents out of sight and the further inference that he had knowledge of the nature of the contents of the tin. As the opium pipe-head and the chandu and chandu dross were found in the attic it must be presumed, until the contrary is proved, under section 37(c) of the Dangerous Drugs Ordinance that the attic was used for the purpose of smoking of chandu by a human being and that the occupier permitted the attic to be used for such purpose. The appellant was not the occupier of the premises but a friend of the occupier. Nevertheless the presumption under section 37(c) makes both the inferences irresistible. As the contents of the confectionery tin were in the appellant's actual physical control, and as the circumstances justified the inference that the appellant intended to exercise control over them for his own purposes, he was, in my opinion, rightly found to be in possession of the chandu and chandu dross.

[65] Reverting to the conduct of the accused when confronted by PW5, it certainly trigger an inference to be drawn in favour of the prosecution. Lord Ackner in *Chan Kwok Keung & Anor v. The Queen* [1990] 1 CLJ 411; [1990] 3 CLJ (Rep) 386, CA, at pp. 388-389, aptly said:

It is common ground that conduct, and in particular the flight of an accused after an offence has been committed, may be tantamount to an admission by him of his guilt of that offence and as such admissible evidence. Their Lordships' attention was invited by Mr. Duckett Q.C. on behalf of the Crown to a number of Australian authorities which illustrate this proposition. But each case must depend on its own particular facts. In those cases to which their Lordships were referred, the flight of the accused had occurred

- A within a short space of time of the offence being committed and in circumstances which clearly connected the accused with the offence.

- [66] In our judgment, the learned Judicial Commissioner considered the defence case in its entirety and from all angles before his Lordship decided that the defence had not raised a reasonable doubt in the prosecution's case. On our part, we are satisfied that at the conclusion of the trial, after considering all the evidence adduced, the prosecution had proved its case beyond reasonable doubt and the accused was rightly convicted for trafficking in the dangerous drugs as per the charge.

The Second Ground

- [67] It was argued that the defence of passive possession as a defence to the charge of trafficking was not considered by the learned Judicial Commissioner at the end of the defence case. It was erroneous, so submitted the learned defence counsel, for the learned Judicial Commissioner to reject the defence of passive possession at the end of the case for the prosecution. Our attention was drawn to pp. 132 to 133 of the appeal record at vol. 2, where the learned Judicial Commissioner said:

- Pada pandangan Mahkamah, berdasarkan kepada fakta yang ada, OKT tidak memiliki ekshibit dadah itu secara pasif kerana beliau membawanya bertujuan untuk diserahkan kepada seseorang (Ah Siong) di bilik 2119, Hotel New York. Oleh itu, terdapat dua pihak yang terlibat, iaitu pembawa dan penerima.

- [68] This ruling, according to the learned defence counsel, was made at the end of the case for the prosecution. It was premature because the defence had not been heard.

- [69] The oral decision of the learned Judicial Commissioner at the close of the case for the prosecution can be seen at pp. 70 to 76 of the appeal record at volume 1. It shows that his Lordship took into consideration the submission of the learned defence counsel that physical possession was proved but not *mens rea* possession. The physical and mental elements of possession were considered by the learned Judicial Commissioner. So, consequently, when his Lordship made reference to the issue of passive possession at p. 132 of the appeal record at vol. 2 as reproduced, his Lordship was

merely expressing his views in regard to the evidence adduced by the prosecution at the stage of the prosecution's case. We find that that was done based on the available evidence as well as the submissions of both parties at the stage of the prosecution's case. Nothing sinister can be read into it. The accused was not prejudiced before the High Court because he was represented by a defence counsel. And no substantial miscarriage of justice has been occasioned thereto.

Observations

[70] We now make the following observations.

[71] The prosecution did not choose to rely on the presumption of knowledge in s. 37(d) of the Dangerous Drugs Act 1952. If they did, they would not have been able to rely on the presumption of trafficking in s. 37(da)(xvi) of the same Act arising from possession of the requisite amount of drug (*Muhammed Hassan v. Public Prosecutor* [1998] 2 CLJ 170).

[72] In the context of possession of a dangerous drug, in order to prove the element of guilty knowledge or *mens rea* the duty of the prosecution is to prove that the accused knew the nature of the particular dangerous drug that he was in possession of as a dangerous drug or as a prohibited drug. There is no necessity for the prosecution to also prove knowledge pertaining to the name, type or exact qualities of the dangerous drug. Here, the prosecution has done just that and we cannot find any fault in that.

[73] The defence of innocent carrier must necessarily bring into the picture the concept of wilful blindness. And according to Yong Pung How CJ (Singapore) in *Public Prosecutor v. Hla Win (supra)* at p. 438, "the concept of wilful blindness qualifies the requirement of knowledge." And his Lordship continued further by saying (at the same page):

As Professor Glanville Williams aptly remarked in his *Textbook on Criminal Law*, at p. 125:

... the strict requirement of knowledge is qualified by the doctrine of wilful blindness. This is meant to deal with those whose philosophy is: 'Where ignorance is bliss, 'tis folly to be wise.' To argue away inconvenient truths is a human failing. If a person deliberately 'shuts his eyes' to the obvious, because he 'doesn't want to know,' he is taken to know'.

A [74] Continuing at the same page, his Lordship said:

B In *Ubaka v. PP* [1995] 1 SLR 267, the principles laid down in *Warner v. Metropolitan Police Commissioner* [1968] 2 All ER 356; [1968] 2 WLR 1303 and modified in *Tan Ah Tee v. PP* [1980] 1 MLJ 49 were applied by the trial judge. In its grounds of judgment, this court quoted the following passage by the trial judge:

Ignorance is a defence when there is no reason for suspicion and no right and opportunity of examination, and ignorance *simpliciter* is not enough.

C [75] Here, we have evidence that the drugs were placed inside transparent plastic packets and the contents can be seen from outside. It was mere folly on the part of the accused not to examine what he carried in his pockets. It is a classic case of willful blindness.

D **Conclusion**

E [76] We have perused the grounds of judgment of the learned Judicial Commissioner. We find that the learned Judicial Commissioner had not misdirected himself on the law. He had considered the evidence both for the prosecution and for the defence very carefully and painstakingly. He gave his reasons why he accepted and why he did not accept certain evidence and he correctly arrived at the conclusions which he did. It is a speaking judgment. He had the advantage of seeing and hearing the evidence. F We do not have that advantage. We see no reason why we should interfere with his findings of facts and his preference for PW2's evidence and not the accused. We also see no reason to interfere in his final decision. We accordingly dismissed the appeal of the G accused.

[77] We confirmed the conviction and sentence imposed by the learned Judicial Commissioner.

H

I